

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

HENRY ADRIEL TAVEL,
Appellant.

No. 2 CA-CR 2012-0354
Filed March 20, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County

No. CR20102340001

The Honorable Terry L. Chandler, Judge

AFFIRMED

COUNSEL

Thomas C. Horne, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Amy Pignatella Cain, Assistant Attorney General, Tucson

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin, Assistant Legal Defender, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Judge Miller and Judge Brammer¹ concurred.

H O W A R D, Chief Judge:

¶1 Henry Tavel appeals from his convictions for two counts of aggravated driving under the influence of an intoxicant (DUI), both based on his having two previous DUI convictions within the preceding eighty-four months. He argues his convictions violate double jeopardy “because the prior DUI convictions are elements of the offense and [he] was previously punished for them.” Finding no error, we affirm.

¶2 A recitation of the underlying facts is not necessary to our resolution of this appeal. Tavel was convicted after a jury trial of four counts of aggravated DUI, specifically: DUI with a suspended license, A.R.S. §§ 28-1381(A)(1), 28-1383(A)(1), driving with an alcohol concentration (BAC) at or above .08 with a suspended license, §§ 28-1381(A)(2), 28-1383(A)(1), DUI with two prior DUI convictions within eighty-four months, §§ 28-1381(A)(1), 28-1383(A)(2), and driving with a BAC at or above .08 with two prior DUI convictions within eighty-four months, §§ 28-1381(A)(2), 28-1383(A)(2). The trial court sentenced Tavel to concurrent four-month prison terms for each offense, to be followed by a five-year term of probation. *See* § 28-1383(D), (H)(1).

¶3 Tavel’s sole argument on appeal² is that his convictions for aggravated DUI pursuant to § 28-1383(A)(2), based on his

¹The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty and is assigned to serve on this case pursuant to orders of this court and the supreme court.

²Tavel was granted permission to file a delayed appeal after he sought relief pursuant to Rule 32.1(f), Ariz. R. Crim. P.

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previous DUI convictions, violate the constitutional prohibition against double jeopardy. He reasons that the previous DUI convictions constitute elements of the current offenses and therefore are “functionally identical” to lesser-included offenses of a violation of § 28-1383(A)(2). He concludes that, because he “was already convicted and punished for those prior DUIs,” and because “a subsequent prosecution for the greater offense[],” following conviction or acquittal of the lesser offense is barred by double jeopardy, his prosecution is barred by double jeopardy principles.³

¶4 As the state points out, we recently rejected an identical argument in *State v. Cooney*, 233 Ariz. 335, ¶¶ 10-17, 312 P.3d 134, 138-40 (App. 2013). We found no double jeopardy violation because “a prior adjudicated offense cannot be a lesser-included offense of a current charge,” *id.* ¶ 13, and “the effect of § 28-1383(A)(2) is to punish a defendant more severely for a recent crime based on his having committed previous crimes, which is precisely what courts have long held is constitutionally permissible,” *id.* ¶ 15. The circumstances in *Cooney* are not distinguishable from those presented here. Accordingly, *Cooney* is dispositive and we need not address Tavel’s argument further.

¶5 We affirm Tavel’s convictions and sentences.

³ Tavel did not raise this argument in the trial court; accordingly, he has forfeited all but fundamental, prejudicial error. *State v. Cooney*, 223 Ariz. 335, ¶ 11, 312 P.3d 134, 138-39 (App. 2013). A double jeopardy violation, however, is fundamental error. *Id.*